(1) 95 589

No.

Supreme Court, U.S.
FILED
OCT 10 1995
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WESTINGHOUSE ELECTRIC CORPORATION and SCHINDLER ELEVATOR CORPORATION,

Petitioners,

v.

BOARD OF MANAGERS OF WINSTON TOWERS NO. 4 CONDOMINIUM ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois for the First District

PETITION FOR A WRIT OF CERTIORARI

NANCY G. LISCHER
Counsel of Record
PATRICIA J. PRANGE
HINSHAW & CULBERTSON
222 North LaSalle Street
Suite 300
Chicago, Illinois 60601-1081
(312) 704-3000

October 11, 1995

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

79 pp

QUESTIONS PRESENTED FOR REVIEW

Plaintiffs twice invoked federal court jurisdiction based on diversity of citizenship. The federal court dismissed the second action with prejudice for plaintiff's failure to amend the complaint properly alleging diversity within the court-ordered time. Plaintiff then filed a third suit in state court and claimed for the first time that the federal court never had jurisdiction and its dismissal with prejudice was a void order. The state appellate court agreed and the state supreme court declined review. The questions presented for review are:

1. Whether a federal court's dismissal with prejudice for failure to comply with a court order is subject to collateral attack on the basis that it is void for want of diversity jurisdiction?

2. Assuming the federal court lacked subject matter jurisdiction, whether it had ancillary jurisdiction and the inherent power to dismiss the action with prejudice as a sanction, even though such a dismissal operates as an adjudication of the merits under Fed.R.Civ.P. 41(b)?

LIST OF PARTIES

Pursuant to Rule 29.6, petitioners state that all the parties to this proceeding are listed in the caption. Petitioner Schindler Elevator Corporation is a wholly owned subsidiary of Schindler Enterprises, Inc., and has no partially-owned subsidiaries. Petitioner Westinghouse Electric Corporation does not have any parent corporations and its partially owned subsidiaries are:

Aeg-Beteiligungageesellschaft Mbh

Aeg-Westinghouse Transport-Systems Gebb

Aws Ansaldo, Spa

C & K Software, Ltd.

Computerized and Advanced Technologies Company

Contadoras Electrice S.A.

Escorts, Ltd.

Greenfield Environmental

Hellenia Business Development

Infrared Fiber Systems, Inc.

Jafco - Ltd. Partnership

Lor-West, Ltd.

Micros Systems Inc.

Powerex, Inc.

Remotec, Inc.

Siam Toracato de Tella, Ltd.

Turbinas T Generadores Turgenca C.A.

Vektron S.A.

W.S. Industries (India) Ltd.

Wb Bottling Corporation

Westinghouse Surveillance Systems Limited

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	vi
JUDGMENT BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL PROVISION AND RULE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
I. The State Decision Conflicts with Established Federal Law that Diversity Jurisdiction Is Presumed to Have Been Found Where a Federal Court Adjudicates the Merits and Enters Final Judgment	8
II. This Court Should Decide Whether Federal Courts Have the Inherent Authority to Adjudicate the Merits of an Action by Dismissing with Prejudice as a Sanction Even Where It Lacks Subject Matter Jurisdiction	16
CONCLUSION	21

APPENDIX

Board of Managers of Winston Tower No. 4 Condominium Association v. Westinghouse Electric Corp., Circuit Court of Cook County No. 92 L 15104, Illinois Appellate No. 1-93-2684, and Illinois Supreme Court No. 78441

Illinois Appellate Court order entered on December 21, 1994 ..... A1

Order of July 6, 1993, entered by Judge Flanagan of the Circuit Court of Cook County . A9

Report of proceedings of July 6, 1993, before the Circuit Court of Cook County A11

Illinois Supreme Court order denying petition for leave to appeal entered on June 1, 1995 . A19

Liberty Mutual Insurance Company v. Westinghouse Electric Corp., U.S. District Court for the Northern District of Illinois, No. 91 C 3147

Minute order of July 2, 1991, on status call .. A20

Minute order of September 3, 1991, granting defendants' motion to dismiss A22

Board of Managers of Winston Towers No. 4 Condominium Association v. Westinghouse Electric Corp., U.S. District Court for the Northern District of Illinois, No. 92 C 478

Excerpt of plaintiff's memorandum in support of opposition to defendants' motions to dismiss A23

Minute order of July 9, 1992, dismissing the complaint without prejudice for lack of subject matter jurisdiction and granting until August 10, 1992, to file an amended complaint "properly asserting a basis for federal jurisdiction" . A30

Memorandum Opinion and Order of July 9, 1992 ..... A33

Minute order of September 24, 1992, dismissing the complaint with prejudice for plaintiff's failure to file an amended complaint A43

Judgment entered on September 24, 1992 ... A46

TABLE OF AUTHORITIES

CASES	PAGE
American Fire & Cas. Co. v. Finn, 341 U.S. 6 (1951)	16
Chambers v. NASCO, Inc., 501 U.S. 32 (1991)	17, 18, 20
Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940)	10, 14, 15
Commodities Export Co. v. U.S. Customs Service, 957 F.2d 223 (6th Cir. 1992), *cert. denied*, 507 U.S. ____, 122 L.Ed.2d 654 (1993)	13
Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990)	18, 19
Costello v. United States, 365 U.S. 265 (1961)	20
Daewoo Electronics Corp. v. W. Auto Supply Co., 975 F.2d 474 (8th Cir. 1992)	20
Des Moines Navigation & R. Co. v. Iowa Homestead Co., 123 U.S. 552 (1887)	10, 14, 15
Disher v. Information Resources, Inc., 873 F.2d 136 (7th Cir. 1989)	15
Durfee v. Duke, 375 U.S. 106 (1963)	15
Foremost Sales Promotions, Inc. v. Director, Bureau of Alcohol, Tobacco & Firearms, 812 F.2d 1044 (7th Cir. 1987)	8
Henderson v. Consol. Merchandising Corp., 286 F. Supp. 697 (N.D.Ga. 1968)	20
Herb v. Pitcairn, 324 U.S. 117, *supp. op.*, 325 U.S. 77 (1945)	2
Hodge v. Hodge, 621 F.2d 590 (3rd Cir. 1980)	13

Honneus v. Donovan, 691 F.2d 1 (1st Cir. 1982) . 13

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) ... 18

Kansas City S. R. v. Great Lakes Carbon Corp., 624 F.2d 822 (8th Cir.), *cert. denied*, 449 U.S. 955 (1980) 13

Kock v. Gov't of Virgin Islands, 811 F.2d 240 (3d Cir. 1987) 13

Kokkonen v. Guardian Life Ins. Co., 511 U.S. ___, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994) . 16, 17

Lambert v. Conrad, 536 F.2d 1183 (7th Cir. 1976) . 13

LeBeau v. Taco Bell, Inc., 892 F.2d 605 (7th Cir. 1989) 20

Link v. Wabash R. Co., 370 U.S. 626 (1962) ... 17, 18

M'Cormick v. Sullivant, 23 U.S. (10 Wheat) 192 (1825) 9, 10, 14, 15

Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985) 15

Mitchell v. Comm'n on Adult Entertainment Establishments, 12 F.3d 406 (3d Cir. 1993) 13

Moser v. Universal Eng. Corp., 11 F.3d 720 (7th Cir. 1993) 18

Nemaizer v. Baker, 793 F.2d 58 (2d Cir. 1986) .. 13

Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978) 17

Pacurar v. Hernly, 611 F.2d 179 (7th Cir. 1979) . 14

Proctor v. Millar Elevator Serv. Co. 8 F.3d 824 (D.C. Cir. 1993) 20

Rappaport v. United States, 557 F.2d 605 (7th Cir. 1977) 8

Riverdale Cotton Mills v. Alabama & Georgia Mfg. Co., 198 U.S. 188 (1905) 12

Skillern's Executors v. May's Executors, 10 U.S. (6 Cranch) 267 (1810) 9, 14, 15

Stoll v. Gottlieb, 305 U.S. 165 (1938) 10, 16

United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812) 17

United States v. United Mine Workers, 330 U.S. 258 (1947) 15

Willy v. Coastal Corp., 503 U.S. 131 (1992) 16, 19, 20

Windholz v. Everett, 74 F.2d 834 (4th Cir. 1935) . 13

OTHER AUTHORITIES

U.S. CONSTITUTION Art. III sec. 2 ..... 2, 18

Fed.R.Civ.P. 11 ..... 18, 19

Fed.R.Civ.P. 41(b) 2-3, 16, 20

Fed.R.Civ.P. 60(b)(4) 14

18 Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE §4428 (1981) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WESTINGHOUSE ELECTRIC CORPORATION and SCHINDLER ELEVATOR CORPORATION,

Petitioners,

v.

BOARD OF MANAGERS OF WINSTON TOWERS NO. 4 CONDOMINIUM ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois for the First District

PETITION FOR A WRIT OF CERTIORARI

Petitioners Westinghouse Electric Corporation and Schindler Elevator Corporation respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of Illinois for the First Judicial District entered in the above entitled proceeding on December 21, 1994.

JUDGMENT BELOW

The unpublished decision of the Appellate Court of Illinois is reprinted in the appendix at A1-8. The Illinois Supreme Court denied the petition for leave to appeal,

which is published at 162 Ill.2d 564, 652 N.E.2d 338 (1995) and is reprinted in the appendix at A19. The decision of the Circuit Court of Cook County is reprinted at A9-18.

STATEMENT OF JURISDICTION

The Appellate Court of Illinois for the First Judicial District entered its order on December 21, 1994 (App. A1). The Illinois Supreme Court denied leave to appeal on June 1, 1995 (App. A19). On August 14, 1995, Justice Stevens granted an extension of time in which to file a petition for a writ of certiorari until October 11, 1995.

This Court has jurisdiction because this appeal involves federal questions which the state appellate court wrongly decided. Supreme Court Rule 10; *Herb v. Pitcairn*, 324 U.S. 117, 125-26, *supp. op.*, 325 U.S. 77 (1945), *overruled in part on other grounds, Michigan v. Long*, 463 U.S. 1032 (1983).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

Article III, section 2 of the United States Constitution provides, in part:

> The judicial Power shall extend . . . to Controversies . . . between citizens of different States; . . .

Rule 41(b) of the Federal Rules of Civil Procedure provides:

> **(b) Involuntary Dismissal: Effect Thereof.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim

against the defendant. Unless the court in its order for dismissal otherwise specified, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

STATEMENT OF THE CASE

On April 22, 1989, there was a fire which allegedly originated in the elevator control panel at Winston Towers condominiums. This fire spawned three lawsuits by the respondent condominium association or its insurer against petitioners. Petitioners seek review of a state appellate court decision which held that the federal court's dismissal with prejudice of the second law suit was not an adjudication on the merits and the doctrine of *res judicata* did not preclude the filing of the third lawsuit in state court.

Plaintiff Twice Invokes the Jurisdiction of the United States District Court

Liberty Mutual Insurance Company, as subrogee of Winston Towers, No. 4 Association, filed a complaint in federal court asserting diversity jurisdiction for alleged damages from a fire (R. C86-88). Plaintiff did not appear at a hearing and the district court warned that failure to appear in the future would result in dismissal for want of prosecution (App. A20). Plaintiff then failed to file a response to defendant's motion to dismiss and this unopposed motion was granted (App. A22). Plaintiff moved to vacate the dismissal and asked leave to voluntarily dis-

miss, which the district court allowed, and the first action was voluntarily dismissed (R. C59).

Plaintiff refiled the same claim, again in federal court, this time in the name of the subrogor, Board of Managers of Winston Towers No. 4 Condominium Association. Plaintiff again asserted diversity jurisdiction (R. C33-34). Defendants moved to dismiss for, *inter alia*, failure to properly allege diversity jurisdiction. In response, plaintiff noted that it was not defendants' position that diversity was lacking, but that the complaint omitted "a few particular words" to plead diversity (App. A26). Plaintiff argued any error could be cured by amending the complaint to make further allegations on diversity (App. A27).

The district court held:

> The court finds that [plaintiff] has failed to properly allege diversity jurisdiction. Although the requirements of diversity jurisdiction may conceivably be inferred from the pleadings, [plaintiff] can easily file an amended complaint to sufficiently clarify the ambiguity.

(App. A35). It granted defendants' motion which challenged the sufficiency of the jurisdictional allegations, dismissed the complaint, and allowed plaintiff leave "to file an amended complaint properly asserting a basis for federal jurisdiction," but warning: "Failure to file within thirty days will result in dismissal of plaintiff's claim" (App. A41-42).

Plaintiff did not file an amended complaint nor did it seek leave to voluntarily dismiss the action on the basis that it could not establish diversity. Instead, plaintiff ignored this order, and the district court *sua sponte* dis-

missed the action "*with prejudice* pursuant to the order entered July 9, 1992 for plaintiff's failure to file an amended complaint" and entered judgment (App. A46, emphasis added). Plaintiff did not appeal.

Plaintiff Files a Third Suit in State Court and the Trial Court Holds that It Will Not Permit a Collateral Attack on the Federal Dismissal with Prejudice

Plaintiff filed a third time in state court (R. C2). This complaint is virtually identical[1] to the second complaint filed in federal court which had been dismissed "with prejudice" (R. C2-8, C25-31). It named the same parties and made the same allegations of negligence (R. C2-8, C25-31).

Defendants moved to dismiss based on the doctrine of *res judicata*, arguing that the federal court dismissal with prejudice was a final adjudication on the merits under Fed.R.Civ.P. 41(b) which barred relitigation in state court (R. C22). Defendants explained:

> Federal courts apply the doctrine of *res judicata* where a trial court *sua sponte* dismissed the first action with prejudice. *Napier v. Thirty or More Unidentified Federal Agents*, 855 F.2d 1080, 1087 (3d Cir. 1988). A federal trial court has the inherent authority to enter an order involuntarily dismissing an action *sua sponte* where a litigant violates a court order or fails to prosecute. *Link v. Wabash R. Co.*, 370 U.S. 626, 629-31 (1962). Such an involuntary dis-

---

[1] The sole differences between the federal and state complaints are the allegations relating to jurisdiction and damages (R. C25-31, C33-39).

> missal is with prejudice and is an adjudication on the merits under Fed.R.Civ.P. 41(b). *Costello v. United States*, 365 U.S. 265, 286-87 (1961); *Zaddack v. A.B. Dick Co.*, 773 F.2d 147, 150 (7th Cir. 1985). The doctrine of *res judicata* then precludes relitigation of that claim. *Napier*, 855 F.2d at 1087.

(R. C176). The state trial court agreed and told the plaintiffs:

> I am not going to sit here and you are not going to sit here and use the state court as a forum to attack an order in federal court. You cannot do it. The underlying philosophy is . . . [y]ou cannot use the state court as a forum to collaterally attack an order in the federal court which is clear on its face.
>
> * * *
>
> There was a certain specified period in which to file an amended complaint establishing diversity jurisdiction. That wasn't done. . . From the case law I read, the order in federal court, [Rule] 41(b) order, is an adjudication on the merits for purposes of *res judicata*, and a subsequent lawsuit filed in state court is barred.

(App. A15-16). The trial court dismissed plaintiff's third lawsuit on the ground it was barred by the doctrine of *res judicata* (App. A9, A15-16).

The State Appellate Court Holds the Federal Dismissal with Prejudice Was Not a Binding Judgment

On appeal, plaintiff argued that the federal court, which jurisdiction it had twice invoked, never had jurisdiction and therefore the order dismissing its action with prejudice for failure to amend its complaint as ordered

was void (App. A2, A4). Defendants argued that federal courts have jurisdiction to determine their own jurisdiction and that they have the jurisdiction to dismiss actions with prejudice where a party fails to prosecute and/or violates a court order (App. A5). They argued that where, as here, the district court had not yet ruled on jurisdiction, the dismissal by the court was an adjudication on the merits under federal law (App. A5).

The appellate court reversed (A1-8). It held that the doctrine of *res judicata* did not bar this action because the federal court lacked subject matter jurisdiction and any federal court order entered without jurisdiction is a legal nullity (App. A6). It held that whether jurisdiction could have been established was "irrelevant" and, because the district court did not have jurisdiction in July (when it dismissed the complaint and granted leave to amend to properly allege diversity), it did not "magically obtain jurisdiction" thereafter in September (when it dismissed the action with prejudice for failure to comply with the federal order to file an amended complaint) (App. A6-7).

The Illinois Supreme Court denied leave to appeal. *Board of Managers of Winston Towers No. 4 Condominium Ass'n v. Westinghouse Elec. Corp.*, 162 Ill.2d 564, 652 N.E.2d 338 (1995) (App. A19).

REASONS FOR GRANTING THE WRIT

I.

THE STATE DECISION CONFLICTS WITH ESTABLISHED FEDERAL LAW THAT DIVERSITY JURISDICTION IS PRESUMED TO HAVE BEEN FOUND WHERE A FEDERAL COURT ADJUDICATES THE MERITS AND ENTERS FINAL JUDGMENT

The holding of the state appellate court that the federal dismissal with prejudice was a nullity and did not bar the subsequently filed state court suit is contrary to the established precedent of this Court and circuit courts. The federal court's order is clear that it had not yet resolved whether diversity existed and it had not yet relinquished jurisdiction over the action (App. A35-36, A41-42).[2] Rather, it found that it had not been adequately pleaded and dismissed the complaint (App. A42). It

---

[2] The July memorandum opinion and order is unequivocal that the action was not dismissed for lack of jurisdiction, rather for the failure to properly plead jurisdictional facts establishing diversity (App. A35, A41-42). The clerks in the Northern District of Illinois customarily use "minute order forms" (which are eventually computerized) to record the proceedings in court, including the filing of a motion or appearance, the setting of a briefing schedule, or the hearing or disposition of a motion (App. A20-22, A30-32). *Foremost Sales Promotions, Inc. v. Director, Bureau of Alcohol, Tobacco & Firearms*, 812 F.2d 1044, 1045 (7th Cir. 1987); *Rappaport v. U.S.*, 557 F.2d 605 (7th Cir. 1977). When the clerk filled in the July 9 minute order form, he stated that the dismissal was "for lack of," and not for "failure to plead," jurisdiction (App. A32). However, the minute order form also refers the reader to the attached district court's memorandum opinion for "further detail" (App. A32 ¶11). Moreover, the clerk's entry makes it clear that the district court was retaining jurisdiction because it further allowed leave to amend to replead diversity (App. A32 ¶10).

retained jurisdiction over the action, granting leave to amend to properly plead diversity (App. A42).

Under the facts of this case, the district court had not finally determined that diversity jurisdiction did not exist, although jurisdiction had been challenged. Thus, the court is presumed to have had jurisdiction to enter subsequent orders and those orders are not subject to collateral attack. The subsequent order dismissing the action "with prejudice" for failure to comply with a prior order was not void for want of jurisdiction, as the state court held.

This Court has squarely held that failure to properly plead jurisdiction does not deprive a federal court of jurisdiction, and decisions rendered by that federal court are neither void nor subject to collateral attack. Attempts to relitigate that claim are barred under the doctrine of *res judicata*. In *Skillern's Executors v. May's Executors*, 10 U.S. (6 Cranch) 267 (1810), this Court held that the failure to plead diversity did not deprive the federal court of jurisdiction and the judgment previously rendered could be executed upon. It again held that federal judgments were not void, despite lack of allegations of diversity jurisdiction in *M'Cormick v. Sullivant*, 23 U.S. (10 Wheat) 192 (1825). This Court explained that to argue that such judgments would be void in the absence of allegations establishing diversity, is premised

> upon an incorrect view of the character and jurisdiction of the inferior courts of the United States. They are all of limited jurisdiction; but they are not on that account, inferior courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded. *If the jurisdiction be not alleged in the proceedings, their judgments and decrees are errone-*

> *ous and may, upon a writ of error, or appeal, be reversed for that cause. But they are not absolute nullities.*

M'Cormick, 23 U.S. at 197 (emphasis added).

Over 100 years ago, this Court stated:

> It was settled by this court at a very early day that although the judgments and decrees of the circuit courts might be erroneous, if the records failed to show the facts on which the jurisdiction of the court rested, such as that the plaintiffs were citizens of different States from the defendants, yet they were not nullities, and would bind the parties until reversed or otherwise set aside.

Des Moines Navigation & R. Co. v. Iowa Homestead Co., 123 U.S. 552, 557 (1887). *Accord Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940) (holding that the judgments of a court subsequently declared unconstitutional were not subject to collateral attack). Diversity of citizenship is a "quasi-jurisdictional fact" and, even if diversity does not actually exist, a judgment rendered by a federal court is not subject to collateral attack. *Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938).

> Where adversary parties appear, a court must have the power to determine whether or not it has jurisdiction of the person of a litigant, or whether its geographical jurisdiction covers the place of the occurrence under consideration. *Every court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter. . .*

Stoll, 305 U.S. at 171-72 (emphasis added).

Here, the plaintiff twice filed in federal court, both times asserting that there was federal diversity jurisdic-

tion. When the sufficiency of the allegations regarding diversity were challenged in the second lawsuit, the plaintiff told the court that the defendant's motion did not raise a "substantive issue as to whether jurisdiction lies," but merely challenged the "choice of language" (App. A27-28). Plaintiff argued to the federal court that "any such error can be corrected by amending the complaint" (App. A27).

The federal court agreed and stated that although "the requirements of diversity jurisdiction may conceivably be inferred from the pleadings, [plaintiff] can easily file an amended complaint to sufficiently clarify the ambiguity" and granted leave to amend (App. A35-36, A42). However, the July 9 order warned: "Failure to file [an amended complaint] within thirty days will result in dismissal of plaintiff's claim" (App. A42). After plaintiff ignored this order for over two months, the federal action was "dismissed with prejudice pursuant to the order entered July 9, 1992 for plaintiff's failure to file an amended complaint" (App. A46). The plaintiff then filed its action for the third time in state court, claiming for the first time that jurisdiction never had existed in the two federal actions.

This Court has expressly disapproved of a party's manipulation of our parallel court system, as the plaintiff has done here, and held that where a party seeks jurisdiction, it is bound by federal orders:

> It thus appears that a party carries on a litigation in a Federal court on its merits and, when beaten in that court, goes into a state court, and claims that, by reason of his own untruthful admission of citizenship, the Federal court assumed a jurisdiction which

> in fact it could not take, and that all the proceedings in that court must go for naught.
>
> * * *
>
> Where parties litigate in a Federal court, whose jurisdiction is invoked on the ground of diverse citizenship, . . . the judgment or decree which is entered is conclusive, and cannot be upset by either of them in any other tribunal on the mere ground that there was in fact no diverse citizenship.

Riverdale Cotton Mills v. Alabama & Georgia Mfg. Co., 198 U.S. 188, 194-95, 197 (1905).

The appellate court's decision that the district court's orders were void and that it would not give full faith and credit to the district court's dismissal with prejudice is contrary not only to the decisions of this Court, but also to circuit court decisions, which routinely hold that a prior decision on the merits is binding and may not be collaterally attacked as void for lack of jurisdiction. As the Fourth Circuit explained:

> In every suit in a federal court, the question of jurisdiction is always present, whether expressly raised or not; and any ruling upon the merits carries with it by implication a ruling on jurisdiction, which, if erroneous, must ordinarily be corrected not later than the term at which judgment is rendered or while the cause is pending on appeal. But such error, even where federal jurisdiction does not appear upon the record, does not render the judgment absolutely void or subject it to collateral attack, if the parties are properly before the court and the cause is one within the general class of which the federal courts may take jurisdiction upon the existence of a specific basis therefor, such as diversity of citizenship or the fact that defendant is a federal officer.

Windholz v. Everett, 74 F.2d 834, 835 (4th Cir. 1935). *See also Hodge v. Hodge*, 621 F.2d 590, 592 (3rd Cir. 1980); *Commodities Export Co. v. U.S. Customs Service*, 957 F.2d 223, 226 (6th Cir. 1992), *cert. denied*, 507 U.S. ___, 122 L.Ed.2d 654 (1993); *Honneus v. Donovan*, 691 F.2d 1, 2 (1st Cir. 1982). *See generally* 18 Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE §4428 (1981).[3]

---

[3] Federal courts refuse to permit collateral attacks and uphold the validity of federal orders, despite various jurisdictional irregularities, if a party failed to challenge jurisdiction in that proceeding. *Accord Mitchell v. Comm'n on Adult Entertainment Establishments*, 12 F.3d 406, 408-09 (3d Cir. 1993) (holding that the sovereign immunity defense under the Eleventh Amendment is "quasi-jurisdictional" and holding that "where nonwaivable subject matter jurisdiction is lacking but not raised, a final judgment has *res judicata* effect in a subsequent proceeding, and a collateral attack based on the want of subject matter jurisdiction is barred"); *Kock v. Gov't of Virgin Islands*, 811 F.2d 240, 243 (3d Cir. 1987) (holding that a decision was an adjudication on the merits despite failure to give timely notice, a jurisdictional prerequisite to bringing suit, and could not be collaterally attacked in a supplemental proceeding); *Nemaizer v. Baker*, 793 F.2d 58, 64 (2d Cir. 1986) (rejecting argument that a dismissal with prejudice was not an adjudication on the merits of state law claims for lack of jurisdiction because of federal preemption and holding that "[e]ven assuming that this case was not properly within the jurisdiction of the district court" and was improperly removed, a collateral attack of that court's exercise of jurisdiction would not be permitted in "the interest in finality of judgments"); *Lambert v. Conrad*, 536 F.2d 1183, 1185 (7th Cir. 1976) (holding that "a prior decision remains a bar to a future action even though it now appears that the court had no jurisdiction in the prior action" because an improper party was named); *Kansas City S. R. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 825 (8th Cir.), *cert. denied*, 449 U.S. 955 (1980) (holding that a judgment is not void for lack of jurisdiction even though an indispensable party was not made a party).

In this case, the state appellate court, relying on *Pacurar v. Hernly*, 611 F.2d 179 (7th Cir. 1979), failed to recognize the difference between a finding that there had been a failure to plead jurisdiction and a finding that jurisdiction is lacking. With the former finding, the situation in this case, once a final order has been entered, that order may not be collaterally attacked on the ground it is void for lack of jurisdiction under *Skillern, M'Cormick* and *Des Moines Navigation*. With the latter, the situation in *Pacurar*, any dismissal after a determination that the district court lacks jurisdiction is, of course, without prejudice to bringing another suit.

It is black letter law that the doctrine of *res judicata* bars all claims that were brought or could have been brought, including jurisdictional challenges. *Chicot*, 308 U.S. at 378. If plaintiff had wanted to challenge the jurisdiction of the district court to dismiss its claim with prejudice for violation of a court order, plaintiff's option was to appeal or move to vacate under Fed.R.Civ.P. 60(b)(4). Judgments entered in cases where jurisdiction is not alleged may be reversed on appeal, "[b]ut they are not nullities." *Des Moines Navigation*, 123 U.S. at 558.

Under this Court's established precedent, it should summarily reverse the state appellate court and enter judgment for defendants. Having failed to appeal or move to vacate based on the lack of jurisdiction, plaintiff may not collaterally attack the federal order in state court, claiming for the first time that the federal court lacked jurisdiction. Plaintiff's belated excuse for ignoring the federal court order (that plaintiff could not allege diversity) is insufficient and does not avoid the preclusive effect of the federal judgment. Jurisdiction is for the

judiciary to decide. *Chicot*, 308 U.S. at 377. Public policy "dictates that there be an end of litigation" and therefore federal judgments, despite ambiguous jurisdiction, are not subject to collateral attack. *Durfee v. Duke*, 375 U.S. 106, 111 (1963).

The district court never relinquished jurisdiction by its July 9 order granting leave to amend to properly plead jurisdiction (App. A42). *Compare Disher v. Information Resources, Inc.*, 873 F.2d 136, 139-40 (7th Cir. 1989). The federal court was not deprived of jurisdiction or authority to dismiss the claim with prejudice when plaintiff ignored a federal court order merely because the stricken complaint did not properly allege a basis for diversity jurisdiction. Under *Skillern*, *M'Cormick*, and *Des Moines Navigation*, the federal court's jurisdiction is presumed and its orders are not subject to collateral attack for want of jurisdiction. Until a court finally determines it lacks jurisdiction over an action, it has the authority to enter orders in that case. *United States v. United Mine Workers*, 330 U.S. 258, 291-92 (1947).

Alternatively, this Court should accept this case for review because it involves important issues. First, it involves the doctrine of comity and our parallel systems of government. Federal courts give full faith and credit to state judgments and accord the same preclusive effect to them that a state court would give. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985). Likewise, state courts must be required to give the same preclusive effect to federal judgments that federal courts would give them. Second, it involves the apparent conflict between two established principles of law. *Skillern*, *M'Cormick*, and progeny hold that diversity jurisdiction must be presumed, even where it is not

pleaded and does not exist, and cannot be collaterally attacked where a final order has been entered. *See also Stoll*, 305 U.S. at 171-72. Yet, on the other hand, federal jurisdiction cannot be created by judicial fiat, consent of the parties, or estoppel. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. ___, 114 S.Ct. 1673, 128 L.Ed.2d 391, 395 (1994); *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17-18 (1951). This Court should accept this case for review to resolve these issues.

II.

THIS COURT SHOULD DECIDE WHETHER FEDERAL COURTS HAVE THE INHERENT AUTHORITY TO ADJUDICATE THE MERITS OF AN ACTION BY DISMISSING WITH PREJUDICE AS A SANCTION EVEN WHERE IT LACKS SUBJECT MATTER JURISDICTION

Assuming, *arguendo*, the district court lacked diversity jurisdiction over the two federal actions filed by the plaintiff (as the plaintiff later contended in state court), the question then becomes whether a federal court has the ancillary jurisdiction to impose the sanction of dismissal with prejudice, which is an adjudication on the merits under Rule 41(b), even where that court did not have subject matter jurisdiction over the claim itself?

Federal courts are courts of limited jurisdiction and derive their jurisdictional power from the Constitution and statutes. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. ___, 114 S.Ct. 1673, 128 L.Ed.2d 391, 395 (1994), *citing Willy v. Coastal Corp.*, 503 U.S. 131 (1992). "[T]he limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded

nor evaded." *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 376 (1978).

However, federal courts also possess certain inherent powers, or ancillary jurisdiction,[4] which exist for two purposes:

> (1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent [citations]; and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.

Kokkonen, 128 L.Ed.2d at 397. To effect the latter purpose, courts have upheld sanctions such as payment of attorney fees and contempt orders. *Kokkonen*, 128 L.Ed.2d at 397, *citing Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 n.8 (1991) *and United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812). Federal courts also have the inherent authority to impose the severe sanction of dismissal for disregard of court orders or where a litigant fails to prosecute his claim. *Chambers*, 501 U.S. at 45, *citing Link v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962). A statutory basis is not required for such orders because a federal court's "inherent power extends to a full range of litigation abuses." *Chambers*, 501 U.S. at 46; *Link*, 370 U.S. at 630.

There is a necessary tension between a federal court's ancillary jurisdiction to dismiss an action as a sanction

---

[4] This Court has described the power to sanction a party by dismissal of an action with prejudice as proper under its "inherent powers" (*Chambers v. NASCO, Inc.*, 501 U.S. 32, 47-48 (1991)) and under its "ancillary jurisdiction" (*Kokkonen*, 128 L.Ed.2d at 397).

and a federal court's limited diversity jurisdiction. The latter is, of course, a constitutional limitation. U.S. CONSTITUTION Art. III sec. 2. This Court has recognized the former as necessary so that federal courts can control their dockets and "achieve the orderly and expeditious disposition of cases." *Link*, 370 U.S. at 630-31. It is meant to be punitive. *Chambers*, 501 U.S. at 45; *Link*, 370 U.S. at 633-34. Finally, "[i]t is also a method of maintaining the integrity of judgments by preventing relitigation of the issues." *Moser v. Universal Eng. Corp.*, 11 F.3d 720, 725 (7th Cir. 1993).

Recently, this Court has twice held that federal courts have the power to impose sanctions on a party, despite lack of subject matter jurisdiction. However, in both cases, this Court has expressly noted that only collateral matters, and not the merits of the cases, were adjudicated.[5]

In *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990), a district court's sanction was upheld under Rule 11. The sanction was imposed after the claim had been voluntarily dismissed. Because there was no case or controversy pending before the court, it lacked subject matter jurisdiction over the merits of the case. This Court held that the district court had ancillary jurisdiction to sanction, despite the lack of jurisdiction, because

---

[5] This Court has addressed this issue with regard to personal jurisdiction. It held that lack of personal jurisdiction is not a constraint in sanctioning a party by a dismissal under Rule 37, which is also an adjudication on the merits. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982). In so holding, this Court expressly noted that personal jurisdiction, unlike subject matter jurisdiction, can be waived or consented to by the party. *Id.* at 702-04.

a Rule 11 proceeding is collateral to, and did not require an adjudication of, the merits. *Cooter & Gell*, 496 U.S. at 395.

Similarly, in *Willy v. Coastal Corp.*, this Court held that even though the district court erred in holding it had subject matter jurisdiction over the claim, this did not deprive the district court of the jurisdiction to impose a sanction under Rule 11. Again, one of the grounds of this Court's holding was that the collateral proceeding did not require an adjudication on the merits. *Willy*, 503 U.S. at 137-38. Because this Court found that the sanction was within the scope of the rules, it did not decide whether the sanction could "constitutionally be applied even when subject-matter jurisdiction is eventually found lacking" under the federal court's inherent powers. *Willy*, 503 U.S. at 139 n.5.

The important question presented in this case is whether a federal court has ancillary jurisdiction to impose the sanction of dismissal with prejudice, which operates as an adjudication on the merits, upon a party who invokes federal jurisdiction?

In the second federal lawsuit, the district court dismissed the complaint without prejudice for failure to properly plead subject matter jurisdiction (diversity) (App. A41-42). However, it did not dismiss the action. Instead, on July 9, it granted leave to replead and warned that if the plaintiff failed to file an amended complaint, the action would be dismissed with prejudice (App. A42). The plaintiff ignored the order and the district court dismissed the action and entered judgment, stating that the action was "dismissed with prejudice pursuant to the order entered July 9, 1992 for plaintiff's failure to file an amended complaint" (App. A46).

Such an order is an adjudication on the merits under Fed.R.Civ.P. 41(b) and is not subject to collateral attack under the doctrine of *res judicata*. *Costello v. United States*, 365 U.S. 265, 286 (1961); *Proctor v. Millar Elevator Serv. Co.* 8 F.3d 824, 825 (D.C.Cir. 1993); *Daewoo Electronics Corp. v. W. Auto Supply Co.*, 975 F.2d 474, 478 (8th Cir. 1992); *LeBeau v. Taco Bell, Inc.*, 892 F.2d 605, 608 (7th Cir. 1989); *Henderson v. Consol. Merchandising Corp.*, 286 F.Supp. 697 (N.D.Ga. 1968).

This Court should decide whether a federal court has ancillary jurisdiction to impose the sanction of dismissal which, under federal law, is an adjudication on the merits. Fed.R.Civ.P. 41(b). If the state court was correct that a federal court lacks the authority to dismiss the action with prejudice for a plaintiff's disregard of court order and failure to prosecute, then the sanction is toothless because it carries no consequences, other than to require refiling of the identical complaint. Yet, this Court has recognized that dismissal of an action is intended to be "a particularly severe sanction." *Chambers*, 501 U.S. at 45.

This important issue should be decided by this Court. As this Court has recognized, even where there is a determination that a court lacks subject matter jurisdiction, this "does not automatically wipe out all proceedings had in the district court" and the "interest in having rules of procedure obeyed . . . does not disappear upon a subsequent determination that the court was without subject matter jurisdiction." *Willy*, 503 U.S. at 137.

CONCLUSION

For the foregoing reasons, petitioners Westinghouse Electric Corporation and Schindler Elevator Corporation pray this Court to grant this petition for a writ of certiorari, to reverse the Illinois Appellate Court for the First Judicial District and to affirm the Circuit Court of Cook County.

Respectfully submitted,

NANCY G. LISCHER
Counsel of Record
PATRICIA J. PRANGE
HINSHAW & CULBERTSON
222 North LaSalle Street
Suite 300
Chicago, Illinois 60601-1081
(312) 704-3000

October 11, 1995